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94-11

February 15, 1991

Ms. Donna Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Application of Telephone and Data Systems, Inc.
To Establish A New System In the DPCRTS To
Provide Service In Wisconsin RSA #8 - Vernon
(File No. 10209-CL-P-715-B-88)

Dear Ms. Searcy:

Herewith transmitted, on behalf of Telephone and Data Systems, Inc. ("TDS"), are an original and four copies of its "Contingent Application For Review" with respect to the Common Carrier Bureau's Order on Reconsideration (DA 90-1917), released January 15, 1991 in the above-referenced proceeding.

Pursuant to Section 22.6 of the FCC's Rules, three microfiche copies of this "Contingent Application For Review" are being filed herewith.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

Peter M. Connolly

Enclosures

ORIGINAL

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FEB 15 1991

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of	)	
	)	
TELEPHONE AND DATA SYSTEMS, INC.	)	
	)	File No. 10209-CL-P-715-B-88
For Authority To Construct and	)	
Operate a Domestic Cellular	)	
Radio Telecommunications System	)	
On Frequency Block B To Serve	)	
Wisconsin RSA #8 - Vernon	)	

CONTINGENT APPLICATION FOR REVIEW

Telephone and Data Systems, Inc. ("TDS"), by its attorneys, hereby files a "Contingent Application for Review" concerning one aspect of the Common Carrier Bureau's ("the Bureau's") Order on Reconsideration ("Order") (DA 90-1917), released January 15, 1991. The Order affirmed the grant of TDS's application and, if no other party files an Application for Review, TDS will dismiss this one. If, however, any other parties seek Commission review of the Order, we would ask the Commission also to review the issue raised here.

Reasons Warranting Relief And Request For Relief

TDS seeks review pursuant to Section 1.115(b)(2)(i) and (b)(2)(ii) of the Commission's Rules, which state respectively that review may be sought if a staff action is in conflict with [a Commission] regulation, case precedent or established Commission policy or if "the action involves a question of law or policy which

has not previously been resolved by the Commission."

In the Order, the Bureau affirmed the grant of TDS's application in Wisconsin RSA #8 by the Mobile Services Division.[1] However, the Bureau also held (Order, Para. 7) that a violation of Section 22.921(b)(1) of the FCC's Rules had occurred when UTELCO, Inc., which is a local exchange telephone company in Wisconsin RSA #8 in which TDS holds a 49% interest but which had not applied to provide cellular service in the RSA, had been admitted into a settlement agreement by certain other wireline applicants in Wisconsin RSA #8. Section 22.921(b)(1) prohibits a party from having "an ownership interest, direct or indirect, in more than one" application in the same market.

However, in concluding that there was a violation (albeit technical) here, the Bureau did not discuss the fact that never previously had a violation of Section 22.921(b)(1) been found to occur except where the forbidden cross interests existed among initial applicants at the time they filed their applications. Nor had the FCC ever held or implied that a settlement agreement, whether between applicants or among applicants and non-applicants, could create the type of interests which are proscribed by Section 22.921(b)(1). In view of the Commission's strong policy favoring wireline settlements, we submit that it is far better policy to hold that settlement agreement do not create the "interests"

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[1] See also Telephone and Data Systems, Inc., 4 FCC Rcd 8021 (M.S.D. 1989) ("the MSD Order").

covered by Section 22.921(b)(1), as the MSD had earlier ruled, rather than proceeding, as to the Bureau did here, by finding a violation and then not imposing a sanction on TDS. As we show below, the position we advocate is also far more consistent with the text of the Commission's rules than is the Bureau's unexplained interpretation.

We ask that the FCC reconsider and rule on the question of whether the action of UTELCO and the other settling parties violated Section 22.921(b)(1).

Accordingly, TDS requests that the Commission (a) grant this Contingent Application For Review; and (b) rule that Section 22.921(b) was not violated in the circumstances of this case.

I. Section 22.921(b)(1) of The FCC's Rules Has Not Been Violated In this Case

Though the Bureau, at Paragraph 7 of the Order, held that "a violation of Section 22.921(b) occurred when UTELCO entered into the partial settlement agreement," it furnished no reasons or arguments to support this conclusion. Instead, the Bureau discussed the reasons why, despite that finding, TDS's application should not be dismissed. The Bureau's failure to support its holding is instructive. It demonstrates the impossibility of showing that wireline settlement agreements create any form of ownership interests which are cognizable under Section 22.921(b)(1). As TDS has previously shown in its Reply to the Petition To Deny and Opposition to the Petition For Reconsideration, and will demonstrate again below, neither the

settlement agreement at issue here nor any other wireline settlement agreement can create such interests.

Section 22.921(b)(1) of the FCC's Rules provides, in pertinent part, that:

> "No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered. (emphasis added)."

As is acknowledged by all parties to this case, TDS filed an application to serve Wisconsin RSA #8 and UTELCO did not file an application for that RSA. TDS also had no interest in any other wireline applicant in Wisconsin RSA #8 when the initial applications were filed. When UTELCO, in which TDS has an interest, did not file, Section 22.921(b)(1) was met.

However, the Bureau has apparently (although it does not explicitly say so) accepted the argument offered by the petitioners below, that because non-applicant UTELCO signed a post-filing settlement agreement with certain applicants in the RSA, TDS thereby acquired a derivative pro rata 3.5% interest in the applications of each of the participants in the settlement agreement, as well as maintaining a 100% interest in its own application, thus giving rise to a violation of Section 22.921(b)(1).

As the Bureau recognized (Order, Paragraph 5), the basic context in which this case arises derives from the Commission's policy favoring wireline settlement agreements. From the beginning, the Commission has repeatedly and consistently held that

pre and post filing settlement agreements among wireline applicants, in MSAs and RSAs, serve the public interest and are encouraged.[2] Indeed, the policy favoring settlements was a important factor in the Commission's decision to retain the wireline set-aside when the Commission adopted cellular lotteries.[3] Section 22.921(b)(1), the FCC's cellular cross interest rule, has been in existence since 1984,[4] that is, during the period when the Commission has encouraged and implemented wireline settlement agreements, and neither the Commission nor the Bureau had ever held or implied until now that pre-lottery wireline settlement agreements create the type of "ownership interests" which Section 22.921(b)(1) was intended to cover.

If settlement agreements could be considered to create the type of interests which are subject to Section 22.921(b)(1), then that rule would necessarily have had an exception to permit settlement-created "interests," since such interests are favored by the Commission. But there is no such exception for cross interests under Section 22.921, as there is for "major changes" in ownership

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2 See, e.g., Cellular Communications Systems (Cellular Reconsideration Order, 89 FCC 2d 58, 76 (1982); Cellular Lottery Order, 56 R.R. 2d 8, 27 (1984); Cellular Radio Lotteries (Order on Reconsideration), 101 FCC 2d 577, 588 (1985); Cellular Service (Settlements and Changes of Ownership), 59 R.R. 2d 1450 (C.C. Bur. 1986); Rural Cellular Service (Third Report and Order), 64 R. R. 2d 1383, 1386 (1988): Rural Cellular Service, 64 R.R. 2d 1637 (C.C. Bur. 1988).

3 Cellular Lottery Order, 56 R.R. 2d, at 24.

4 See Cellular Lottery Order, 56 R.R. 8, 38-39 (1984).

under Section 22.23.[5] Consequently, "interests" created by settlement agreements, including UTELCO's "interests" in issue here, are not cross-interests covered by Section 22.921.

Nowhere until this case had the Commission or Common Carrier Bureau held that a violation of Section 22.921(b)(1) might be found as the consequence of any settlement arrangement, whether between applicants, or between applicants and a non-applicant, as is the case here. The other cases decided by the Commission and the Bureau in which violations of Section 22.921(b)(1) have been found to exist were all involved forbidden cross-interests among initial applicants.[6] Those cases have nothing whatever to do with interests created by settlement agreements and do not support the Bureau's holding here.

Section 22.921(b)(1), by its terms, forbids any party from holding a forbidden cross interest in more than one application for the same RSA. Applications are of course filed only by applicants.

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5 Generally, major changes in the ownership of applicants cause their applications to be treated as "newly filed," and therefore subject to dismissal if the change in ownership post-dates the filing deadline. See Sections 22.23(c)(4) and 22.23(g) of the Commission's Rules. However, in 1984 an exception was created by Section 22.23(g)(4) to permit "major changes" caused by settlement agreements to be made without treating the applications as "newly filed."

6 Progressive Cellular III B-3, DA 91-68, Mobile Services Division, released January 31, 1991; Florida Cellular Mobile Communication Corporation, DA 91-34, Mobile Services Division, released January 18, 1991; MV Cellular, Inc., 103 FCC 2d 414, 418-20 (1986); Portland Cellular Partnership, 2 FCC Rcd 5586, 5587, (MSD 1987) aff'd 4 FCC Rcd 2050 (FCC) 1989); and Henry County Telephone Company, et al. Mimeo No. 2747 (C.C. Bur., released February 21, 1986).

Thus, the ownership interests forbidden by the Rule can arise only as a consequence of the filing of an application. If no application has been filed, no interest can be created which is cognizable under the Rule. The Rule does not discuss settlement agreements or any interests which may be created by them. Accordingly, it cannot reasonably be construed to include such interests. This was the reasoning adopted in the MSD Order and the MSD was correct.

This analysis is also supported by previous Commission treatment of Section 22.33(b) of the Commission's Rules.[7] That section allows wireline applicants to enter into partial settlement agreements which receive the "cumulative lottery chances." Those "cumulative chances" have not been regarded as equivalent to giving settling parties ownership interests in each other's applications,

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[7] In relevant part, Section 22.33(b) reads as follows:

> (b) Cumulative chances of partial cellular settlements. (1) Top-120 Markets. The joint enterprise resulting from a partial settlement among mutually exclusive cellular applicants for any one of the top-120 cellular modified Metropolitan Statistical Areas, if entered into after the filing of individual applications by its members, will receive the cumulative number of lottery chances that the individual applicants would have had if no partial settlement had been reached.
>
> (2) Markets Beyond the Top-120 and Rural Service Areas. In markets beyond the top-120 cellular modified Metropolitan Statistical Areas, the cumulative lottery chances described in paragraph (b)1(1) of this section will be awarded to joint enterprises resulting from partial settlements among mutually exclusive wireline applicants only. ....

or else those applications would be subject to dismissal under Section 22.921(b). Such ownership interests come into existence only when, subsequent to the lottery, the lottery winner amends its application to substitute the entity whose formation was contemplated by the settlement agreement. And, as the Commission has held, the Commission's Rules do not require winning applicants to amend their applications to implement settlement agreements, as they would logically have to if settlement agreements created "contingent" ownership interests. See American Cellular Network Corp. of Nevada, 63 R. R. 2d 1313 (1987).

And, this reasoning applies a fortiori where the interests said to be created by the relevant settlement agreement arise not as a consequence of the actions of the applicant said to have acquired the interest, namely TDS, but rather as a result of the actions of non-applicant UTELCO, in which TDS holds a minority interest, and those other applicants seeking the dismissal of TDS's application.

Moreover, it is fair and reasonable for the FCC to interpret Section 22.921(b)(1) so as to hold applicants and only applicants responsible for any forbidden cross-interests that may exist among them. All applicants are on notice about what the rules require, and can take whatever steps are necessary to comply with the Rules. However, it is not comparably fair or reasonable to hold an applicant responsible for a settlement agreement reached by a non-applicant company, including one in which the applicant may have a minority ownership position, with other applicants.

As noted above, the FCC never said or even intimated prior to the Order that Section 22.921(b)(1) was intended to cover the interests created by settlement agreements, let alone interests arguably created by the actions of non-applicants signing such agreements. Before imposing the draconian sanction of dismissal, which is what the petitioners sought in this case and may seek on review, due process and fundamental fairness would require that the standard prescribed by a Commission rule be clear and readily ascertainable. See Radio Athens, Inc. (WATH) v. FCC, 401 F. 2d 398, 404 (D.C. Cir. 1968) (FCC dismissal of radio station application reversed when the application of the broadcast cross-ownership rule to applicant was ambiguous); Salzer v. FCC, 778 F. 2d 869, 875 (D.C. Cir. 1985) (FCC dismissal of LPTV applications reversed when standard for application acceptance was unclear); Maxcell Telecom Plus, Inc. v. FCC, 815 F. 2d 1551, 1560 (D.C. Cir. 1987) (FCC provided insufficient notice of filing requirements before dismissing cellular "fill in" application). Section 22.921(b)(1) would certainly not have met the required standard of clarity in 1989 if TDS were now held to have violated the rule, especially in light of the MSD's holding in 1989 that Section 22.921(b)(1) was not violated by the entry of UTELCO into the settlement group. TDS should certainly not be held to a higher standard of interpretive knowledge of the FCC's rules than the Mobile Services Division.

The Bureau recognized the unfairness of applying its current understanding of the rule to TDS when it held that it would not

dismiss TDS's application. However, the Bureau's refusal to dismiss TDS's application, while certainly justified and indeed necessitated by the due process concerns discussed above, is a solution to a non-problem, as no rule violation has occurred.

Conclusion

For the foregoing reasons, TDS requests that the Commission reverse the Bureau and rule that Section 22.921(b)(1) of its rules was not violated by UTELCO's entry into the settlement agreement.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: Alan Y. Naftalin PC
Alan Y. Naftalin

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Its Attorneys

February 15, 1991

Certificate of Service

I, Theresa Belser, a secretary in the offices of Koteen & Naftalin, hereby certify that I have served a true copy of the foregoing "Contingent Application For Review" on the following, by First Class United States mail, this 15th day of February, 1991:

Kenneth E. Hardman, Esq.
2033 M Street, N.W.
Suite 400
Washington, D.C. 20036

Theresa Belser